

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 03-1721
)
MALLORY KAUDERER and NEW)
RIVIERA REALTY, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 12, 2003, by video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Alpheus C. Parsons, Esquire
Department of Business and
Professional Regulation
Hurston Building, North Tower, Suite N801
400 West Robinson Street
Orlando, Florida 32801

For Respondent: Arnaldo Velez, Esquire
35 Almeria Avenue
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

Whether the Respondents committed the violations alleged in the Administrative Complaint dated February 19, 2003, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an eight-count Administrative Complaint dated February 19, 2003, the Department of Business and Professional Regulation, Division of Real Estate ("Division"), charged Mallory Kauderer and New Riviera Realty, Inc. ("New Riviera Realty"), with violations of Section 475.25(1)(e), Florida Statutes (2000).¹ Specifically, the Division charged Mr. Kauderer and New Riviera Realty, in separate but identical counts, with having operated as brokers without holding current broker licenses, in violation of Section 475.42(1)(a), Florida Statutes, and of Section 475.25(1)(e); with having obstructed or hindered the enforcement of Chapter 475, Florida Statutes, or the performance of the lawful duty of a person acting under the authority of Chapter 475, in violation of Section 475.42(1)(i), Florida Statutes, and of 475.25(1)(e); with having failed to prepare written monthly escrow reconciliation statements, in violation of Florida Administrative Code Rule 61J2-14.012(2) and (3) and Section 475.25(1)(e); and with having failed to preserve and make available to the Division all books, records, and supporting documents and to keep an accurate account of all

trust fund transactions, in violation of Florida Administrative Code Rule 61J2-14.012(1) and Section 475.25(1)(e).

The Administrative Complaint includes the following factual allegations to support these charges:

6. From on or about December 14, 1999 through July 18, 2000, Respondents' real estate licenses were involuntarily inactive.

7. On or about April 14, 2001, Respondents conducted a real estate transaction. A copy of the contract is attached hereto and incorporated herein as Administrative Complaint Exhibit 1.^[2]

8. On or about April 30, 2001, Petitioner attempted an audit of Respondents' records and gave Respondents additional time to prepare for a re-audit.

9. On or about September 11, 2001, Petitioner attempted a re-audit, which revealed Respondents did not perform the required monthly escrow account reconciliations. A copy of the audit is attached hereto and incorporated herein as Administrative Complaint Exhibit 2.^[3]

10. On or about September 11, 2001, Subject failed or refused to provide broker records to Petitioner's investigator.

Mr. Kauderer and New Riviera Realty timely disputed certain of the material facts contained in the Administrative Complaint and requested an administrative hearing. The Division forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge.

Pursuant to notice, the final hearing was held on September 12, 2003. At the hearing, the Division presented the testimony of John Esposito, and Petitioner's Exhibits 1 through 9 were offered and received into evidence. Mr. Kauderer testified in his own behalf, but did not offer any exhibits into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on September 17, 2003, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Division is the government licensing and regulatory agency with the responsibility and duty to investigate and prosecute persons holding licenses and registrations as real estate brokers and real estate broker corporations. See § 475.021, Fla. Stat. The Florida Real Estate Commission has the authority to impose discipline on persons licensed pursuant to Chapter 475, Part I, Florida Statutes. See § 475.25, Fla. Stat.

2. Mr. Kauderer is, and was at all times material to this proceeding, a licensed Florida real estate broker, having been issued license number 592835 in accordance with Chapter 475, Part I. The last license issued to Mr. Kauderer was as an active broker at New Riviera Realty, Inc., 500-15th Street #1, Miami Beach, Florida 33139.

3. New Riviera Realty is, and was at all times material to this proceeding, a corporation registered as a Florida real estate broker, having been issued registration number 1011414 in accordance with Chapter 475. The last registration issued was at the address of 500-15th Street #1, Miami Beach, Florida 33139.

4. From April 1 through December 12, 1999, Mr. Kauderer's real estate broker's license was involuntarily inactive due to non-renewal; from December 13, 1999, through July 9, 2000, upon the late renewal of his broker's license, Mr. Kauderer was an inactive broker. Since July 10, 2000, Mr. Kauderer's real estate broker's license has been active, and he has been designated as qualifying broker and officer of New Riviera Realty.

5. From January 1, 1999, through March 31, 1999, New Riviera Realty was an active real estate broker corporation; from April 1, 1999, through April 1, 2000, New Riviera Realty's registration was involuntarily inactive due to non-renewal; on

April 2, 2000, New Riviera Realty's registration was cancelled due to continued non-renewal and no qualified broker. New Riviera Realty has been an active real estate broker corporation since July 10, 2000, with Mr. Kauderer acting as the active corporate broker/officer.

6. Mr. Kauderer's primary business is property development, and he owns and operates a number of businesses in addition to New Riviera Realty.

7. Mr. Kauderer, as the qualifying broker, opened a corporate escrow account in the name of New Riviera Realty on or about February 1, 2000, with a deposit of \$200.00.

8. On April 30, 2001, John Esposito, an investigator for the Division, arrived unannounced at the offices of New Riviera Realty to investigate a complaint that is not the subject of this proceeding. Mr. Esposito also intended to conduct an audit of New Riviera Realty's escrow account at the April 30, 2001.

9. After questioning Mr. Kauderer about matters unrelated to this proceeding, Mr. Esposito told Mr. Kauderer that he needed to look at all of the New Riviera Realty files in which money was being held for disbursement to third parties, including the contracts for the sale and purchase of property. Mr. Esposito also asked for bank statements, checks, deposit slips, and reconciliation statements for New Riviera Realty's escrow account for the previous six months.

10. Mr. Kauderer did not provide Mr. Esposito with any documents, files, or records on April 30, 2001. Rather, Mr. Kauderer advised Mr. Esposito that all of New Riviera Realty's records were kept by Mr. Kauderer's accountant and that he would need to obtain the records for Mr. Esposito's review at a later time.

11. During Mr. Esposito's April 30, 2001, visit to Mr. Kauderer's office, Mr. Kauderer told Mr. Esposito that he had closed the New Riviera Realty escrow account on April 17, 2001, because New Riviera Realty's real estate broker corporation registration was inactive, and he advised Mr. Esposito that he did not intend to re-open the escrow account.

12. Mr. Kauderer also told Mr. Esposito on April 30, 2001, that he had not prepared reconciliation statements for the New Riviera Realty account.⁴

13. Mr. Esposito told Mr. Kauderer that Mr. Kauderer should obtain the records from his accountant and that he, Mr. Esposito, would return within 30 days "to address all issues." Mr. Esposito then questioned Mr. Kauderer about his other businesses.

14. At some point after the April 30, 2001, visit, Mr. Kauderer asked for an extension of time to gather the relevant documents, and Mr. Esposito granted the request.

15. Mr. Esposito and Mr. Kauderer spoke several times on the telephone subsequent to April 30, 2001, and Mr. Esposito reiterated during this time that he wanted Mr. Kauderer to produce all files in which New Riviera Realty, as a real estate broker corporation, was holding money in escrow for distribution to third parties; bank statements for the escrow account; deposit slips; and reconciliation statements. Mr. Esposito originally requested these materials for the six months prior to April 30, 2001, but he later told Mr. Kauderer to provide these documents for the 12 months prior to April 30, 2001.

16. Mr. Kauderer obtained the documents that were in the possession of his accountant, and he sent documents to Mr. Esposito by facsimile transmittal on both August 10 and 13, 2001; Mr. Kauderer included in these documents bank statements for the escrow account for year 2000 and for the period extending from December 31, 2000, through April 17, 2001, as well as a debit memo dated April 17, 2001, showing the closing transaction on the New Riviera Realty escrow account. The transaction reflected on the debit memo was the deduction of \$35.61 from the account, which was the balance of the account at the time it was closed.

17. At or about the time he sent the documents to Mr. Esposito by facsimile transmittal, Mr. Kauderer notified Mr. Esposito that he had prepared an envelope for Mr. Esposito

that Mr. Esposito could pick up at Mr. Kauderer's office. The envelope contained documents that Mr. Esposito had requested for the audit, including reconciled copies of the bank statements Mr. Kauderer had provided Mr. Esposito by facsimile transmittal. Mr. Kauderer left the envelope with a member of his office staff, with instructions to give the envelope to Mr. Esposito whenever he came by the office.

18. Mr. Esposito showed up at Mr. Kauderer's office without an appointment at around 9:00 a.m. on September 11, 2001. When he arrived, Mr. Esposito learned for the first time of the attacks on the World Trade Center and the Pentagon.

19. Mr. Kauderer had an appointment at 10:00 a.m. outside the office. Before leaving for his appointment, Mr. Kauderer spoke with Mr. Esposito and told Mr. Esposito that one of his staff had an envelope with the materials that Mr. Esposito had requested for the New Riviera Realty audit.

20. Mr. Esposito spent approximately two hours at Mr. Kauderer's office on September 11, 2001. He recalls that, during the time he spent at Mr. Kauderer's office on September 11, 2001, he reviewed two real estate contracts and two cancelled \$10,000.00 checks that Mr. Kauderer made available to him that day.

21. One contract was a Contract for Sale and Purchase dated February 7, 2000, that represents an offer by Regents Park

Property, Inc., to purchase real property from Carmen Contero for \$200,000.00.

22. Mr. Kauderer is the owner of Regents Park Property, Inc., and he prepared and signed the contract in his capacity as the president of the corporate buyer.

23. The contract specifies an initial deposit of \$20,000.00, which Mr. Kauderer included because he thought such a deposit would assure Ms. Contero that the offer was a bona fide offer to purchase the property.

24. In addition to signing the contract as the President of Regents Park Property, Inc., Mr. Kauderer signed the contract as the "escrow agent" and included the name of New Riviera Realty under his signature. By signing as the "escrow agent," Mr. Kauderer affirmed that, on February 7, 2000, he received a deposit on the contract of \$20,000.00, which was to be deposited in New Riviera Realty's escrow account.

25. The bank account of Regents Park Property, Inc., was maintained at the Ocean Park Bank in Miami Beach, Florida. New Riviera Realty's escrow account was maintained at the same bank. On or about February 7, 2000, Mr. Kauderer caused \$20,000.00 to be transferred from the account of Regents Park Property, Inc., to the escrow account of New Riviera Realty.

26. Paragraphs 34 and 35 of the Contract for Sale and Purchase, which are headed "Brokerage Fee" and "Brokers,"

respectively, were crossed out. Neither Mr. Kauderer nor New Riviera Realty was to get a commission for the sale of the property to Regents Park Property, Inc. On the part of the form entitled Transaction Broker Notice, Mr. Kauderer disclosed on the Transaction Broker Notice attached to the contract that "The President of Regents Park Property, Inc., is a licensed real estate broker."

27. The property that is the subject of the contract was the house that Mr. Kauderer was renting and in which he resided at the time. Mr. Kauderer prepared the contract because he had been told by Ms. Contero's daughter that Ms. Contero might want to sell the house and move in with her daughter. Mr. Kauderer spoke informally with Ms. Contero before he presented the contract to her, and she told him that her daughter was incorrect, that she did not want to sell the house. As a result, Mr. Kauderer did not present the contract to Ms. Contero.

28. Because Mr. Kauderer did not present the contract to Ms. Contero, he returned the \$20,000.00 deposit to Regents Park Property, Inc. Mr. Kauderer wrote two \$10,000.00 checks, one dated March 18, 2000, and one dated March 23, 2000, drawn on the New Riviera Realty escrow account.

29. The second contract that Mr. Esposito reviewed on September 11, 2001, was a Contract for Purchase and Sale dated

February 28, 2000, that reflects an offer by Robert Gonzalez-Sanchez to purchase a condominium unit from 1606 Jefferson Associates, Inc., identified in the contract as the Seller/Developer. The contract provided for a \$1,000.00 deposit to be held by the Royal Title & Escrow Company, Inc.

30. The contract was signed by Mr. Gonzalez-Sanchez as Buyer and by Mr. Kauderer as the President of 1606 Jefferson Associates, Inc. A form Disclosure Notice to Purchaser Concerning Closing Costs and Employment of Sales Representative was attached to the contract, which was signed by Mr. Kauderer, as President of 1606 Jefferson Associates, Inc., and by Mr. Gonzalez-Sanchez and was dated March 3, 2000. Two other addenda were attached to the Purchase and Sale Agreement, both were signed by Mr. Gonzalez-Sanchez and by Mr. Kauderer, as President of 1606 Jefferson Associates, Inc., and were dated March 3, 2000. New Riviera Realty was not mentioned in the contract and had nothing to do with the transaction.

31. Mr. Kauderer closed New Riviera Realty's escrow account on April 17, 2001, because the \$200.00 with which he had opened the account had been exhausted by fees. The only activity that took place in the New Riviera Realty escrow account, with the exception of the assessment of monthly fees by the bank, was the transfer of \$20,000.00 from the account of Regents Park Property, Inc., to the escrow account and the two

checks Mr. Kauderer wrote on the account returning the \$20,000.00 deposit to Regents Park Property, Inc.

Summary

32. The evidence presented by the Division is not sufficient to establish with the requisite degree of certainty that either Mr. Kauderer or New Riviera Realty operated as a broker without holding a current broker's license. The Division offered into evidence only two documents purporting to evidence real estate transactions in which Mr. Kauderer and New Riviera Realty operated as real estate brokers. One document was a partially executed form Contract for Sales and Purchase that was dated February 7, 2000; Mr. Kauderer signed the document in his capacity as president of the purported Buyer, not in his capacity as a real estate broker. This document was never presented to the Seller, and, even if it had been, it is clear on the face of the document that neither Mr. Kauderer nor New Riviera Realty was expecting a broker's fee or acting as a broker in the transaction. Mr. Kauderer was acting as the Buyer, and New Riviera Realty was acting solely as escrow agent for the \$20,000.00 deposit.

33. The document dated February 28, 2000, is a fully executed contract for the sale and purchase of a condominium apartment. Mr. Kauderer signed this document as the president of 1606 Jefferson Associates, Inc., the Seller/Developer. New

Riviera Realty was not mentioned anywhere in the document, and Mr. Kauderer was not required to be licensed as a real estate broker or salesperson to act on behalf of the Seller/Developer as its president.

34. The evidence presented by the Division is not sufficient to establish with the requisite degree of certainty that either Mr. Kauderer or New Riviera Realty obstructed or hindered Mr. Esposito in carrying out the audit of New Riviera Realty's escrow account. Although Mr. Kauderer did not have the documents Mr. Esposito required at his office on April 30, 2001, when Mr. Esposito arrived unannounced to conduct his audit, Mr. Kauderer agreed to obtain the documents from his accountant and provide them to Mr. Esposito, and Mr. Kauderer timely provided bank statements and deposit slips to Mr. Esposito for the New Riviera Realty escrow account for the years 2000 and 2001 in facsimile transmittals in August 2001. These documents were also made available for Mr. Esposito inspection on September 11, 2001, at Mr. Kauderer's office, together with two contracts and the two checks drawn on New Riviera Realty's escrow account.

35. The evidence presented by the Division is not sufficient to establish with the requisite degree of certainty that either Mr. Kauderer or New Riviera Realty failed to preserve or make available to Mr. Esposito all of the records

and documents relating to New Riviera Realty's escrow account. The activity in the escrow account was limited to the deposit and subsequent withdrawal of the \$20,000.00 that Mr. Kauderer deposited in anticipation of presenting an offer to purchase Ms. Contero's property in his capacity as President of Regents Park Property, Inc. The signature card showing that the escrow account was opened on or about February 1, 2000, bank statements for 2000 and 2001, deposit slips, cancelled checks relating to the account, and the debit memo establishing that the escrow account was closed on April 17, 2001, were made available to Mr. Esposito.

36. The evidence presented by the Division is sufficient to establish that Mr. Kauderer failed to keep monthly reconciliation statements for the New Riviera Realty escrow account.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

38. In its Administrative Complaint, the Division seeks to impose penalties against Mr. Kauderer and New Riviera Realty that include suspension or revocation of Mr. Kauderer's license and New Riviera Realty's registration and/or the imposition of

an administrative fine. Therefore, the Division has the burden of proving by clear and convincing evidence that Mr. Kauderer and New Riviera Realty committed the violations alleged in the Administrative Complaint. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is the proper standard in license revocation proceedings because they are penal in nature and implicate significant property rights. See Osborne Stern, 670 So. 2d at 935.

39. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

40. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

41. In Counts I through VIII of the Administrative Complaint, Mr. Kauderer and New Riviera Realty are charged with having violated Section 475.25(1)(e), Florida Statutes,⁵ which provides:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that

the licensee, registrant, permittee, or applicant:

* * *

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

Counts I and V of the Administrative Complaint.

42. In Counts I and V of the Administrative Complaint, the Division has charged that Mr. Kauderer and New Riviera Realty are guilty of having violated Section 475.42(1)(a), Florida Statutes, and, therefore, Section 475.25(1)(e), Florida Statutes. Section 475.42(1)(a) provides in pertinent part that "[a] person may not operate as a broker or sales associate without being the holder of a valid and current active license therefor."

43. A broker is defined in Section 475.01(1)(a), Florida Statutes, as follows:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed

solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists.

A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

44. Section 475.01(3), Florida Statutes, provides as follows:

Wherever the word "operate" or "operating" as a broker, broker-salesperson, or salesperson appears in this chapter; in any order, rule, or regulation of the commission; in any pleading, indictment, or information under this chapter; in any court action or proceeding; or in any order or judgment of a court, it shall be deemed to mean the commission of one or more acts described in this chapter as constituting or defining a broker, broker-salesperson, or salesperson, not including, however, any of the exceptions stated therein. A single such act is sufficient to bring a person within the meaning of this chapter, and each act, if prohibited herein, constitutes a separate offense.

45. Based on the findings of fact herein, the Division has failed to prove by clear and convincing evidence that either Mr. Kauderer or New Riviera Realty operated as real estate brokers with respect to the document dated February 7, 2000. The real estate contract prepared by Mr. Kauderer was never presented to Ms. Contera as an offer; Mr. Kauderer was not acting "for another" when acting for Regents Park Property, Inc.; and neither Mr. Kauderer nor New Riviera Realty expected to receive any direct or indirect compensation as real estate brokers had Regents Park Property, Inc., ultimately purchased the property identified in the contract prepared by Mr. Kauderer.

46. Section 475.011(2), Florida Statutes, provides for an exemption from the requirements of Chapter 475, Part I, Florida Statutes, for

[a]ny individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its own real property; however, this exemption shall not be available if and to the extent that an agent, employee, or independent contractor paid a commission or other compensation strictly on a transactional basis is employed to make sales, exchanges, or leases to or with customers in the ordinary course of an owner's business of selling, exchanging, or leasing real property to the public.

47. Based on the findings of fact herein, the Division has also failed to prove by clear and convincing evidence that Mr. Kauderer or New Riviera Realty operated as real estate brokers with respect to the real estate contract dated February 28, 2000. New Riviera Realty was not involved in any way in the transaction, and Mr. Kauderer was acting as the president of the Seller/Developer in the sale of a condominium apartment owned by the Seller/Developer. Pursuant to Section 475.011(2), Mr. Kauderer was, therefore, exempted from the real estate broker licensure requirements when acting in that capacity.

48. Because the Division has failed to carry its burden of proving that either Mr. Kauderer or New Riviera Realty operated as brokers in violation of Section 475.42(1)(a), the Division

has failed to prove by clear and convincing evidence that Mr. Kauderer and New Riviera Realty were guilty of violating Section 475.25(1)(e) as alleged in Counts I and V of the Administrative Complaint.⁶

Counts II and VI and Counts IV and VIII.

49. In Counts II and VI of the Administrative Complaint, the Division has charged that Mr. Kauderer and New Riviera Realty are guilty of having violated Section 475.42(1)(i), Florida Statutes, and, therefore, Section 475.25(1)(e), Florida Statutes. Section 475.42(1)(i) provides in pertinent part: "A person may not obstruct or hinder in any manner the enforcement of this chapter or the performance of any lawful duty by any person acting under the authority of this chapter"

50. In Counts IV and VIII of the Administrative Complaint, the Division has charged that Mr. Kauderer and New Riviera Realty are guilty of having violated Florida Administrative Code Rule 61J2-14.012(1) and, therefore, Section 475.25(1)(e), Florida Statutes. Rule 61J2-14.012(1) provides that

A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been

deposited. All such books and accounts shall be subject to inspection by the BPR or its authorized representatives at all reasonable times during regular business hours.

51. The charges in Counts II and IV and Counts IV and VIII apparently relate to the factual allegation in paragraph 8 of the Administrative Complaint that "[o]n or about April 30, 2001, Petitioner attempted an audit of Respondents' records and gave Respondents additional time to prepare for a re-audit," and to the factual allegation in paragraph 10 of the Administrative Complaint that "[o]n or about September 11, 2001, Subject failed or refused to provide broker records to Petitioner's investigator."

52. Based on the findings of fact herein, the Division has failed to prove by clear and convincing evidence that Mr. Kauderer and New Riviera Realty did not provide to Mr. Esposito all of the documents he requested for the audit of the New Riviera Realty escrow account, and, concomitantly, the Division has failed to prove by clear and convincing evidence that Mr. Kauderer and New Riviera Realty obstructed or hindered Mr. Esposito in his performing the audit of New Riviera Realty's escrow account.⁷

Counts III and VII.

53. In Counts III and VII of the Administrative Complaint, the Division has charged that Mr. Kauderer and New Riviera

Realty are guilty of having violated Florida Administrative Code Rule 61J2-14.02(2) and (3), and, therefore, Section 475.25(1)(e), Florida Statutes. Rule 61J2-14.02 provides in pertinent part:

(2) Once monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, an itemized list of the broker's trust liability, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken in reference to shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

54. Based on the findings of fact herein, the Division has proven by clear and convincing evidence that Mr. Kauderer, as the qualifying broker and officer of New Riviera Realty, failed to prepare monthly reconciliation statements for New Riviera Realty's escrow account, in violation of Rule 61J2-14.012(2) and of Section 475.25(1)(e), Florida Statutes.⁸

Recommended penalty.

55. Florida Administrative Code Rule 61J2-24.001 sets forth disciplinary guidelines providing a range of penalties that the Florida Real Estate Commission ("Commission") can impose on licensees who are guilty of having violated Chapter 475, Florida Statutes. Rule 61J2-24.001(3)(f) sets forth the range of penalties specified for a violation of Section 475.25(1)(e) as follows: "The usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of \$1,000."

56. It appears, however, that the Commission is given discretion in Rule 61J2-24.001(3)(f) to deviate from the range of penalties provided for a violation of Section 475.25(1)(e), which is understandable because that section applies broadly to a violation of "any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455." As exemplified by the violation in this case, some violations of Section 475.25(1)(e) are

relatively minor and do not warrant imposition of the penalties set forth in Rule 61J2-24.001(3)(f).

57. Guidance as to the appropriate penalty that should be applied in this case is found in Florida Administrative Code Rule 61J2-24.002, which permits the Commission to issue a citation imposing a fine and other conditions by citation for those violations "for which there is no substantial threat to the public health, safety, and welfare." Based on the findings of fact herein, no funds of persons unaffiliated with Mr. Kauderer were ever deposited in the escrow account and no persons unaffiliated with Mr. Kauderer were ever entitled to a disbursement from the escrow account. Mr. Kauderer has, therefore, proven by clear and convincing evidence that his failure to prepare reconciliation statements during the time the New Riviera Realty escrow account was open did not result in, or threaten, any public harm.

58. The fine and conditions that the Commission may impose for a violation of Rule 61J2-14.012(2) are set forth in Rule 61J2-24.002(hh), (ii), and (jj), which specify different administrative fines to be imposed when a licensee "fails to properly reconcile an escrow account" and require that the licensee complete the "4 hour Instructional Program for Broker Management of Escrow Accounts within 6 months of the citation becoming a final order." The amount of the fine to be imposed

depends on whether the account is in balance and, if it is not in balance, the degree to which it is out of balance.

59. In this case, there is no proof that New Riviera Realty's escrow account was ever out of balance. In accordance with Rule 61J2-24.002(hh), the appropriate administrative fine to be levied against Mr. Kauderer in this case is, therefore, \$100.00.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Commission enter a final order:

1. Dismissing Counts I, II, and IV of the Administrative Complaint against Mr. Kauderer;

2. Dismissing Counts V, VI, VII, and VIII of the Administrative Complaint against New Riviera Realty;

3. Imposing an administrative fine against Mr. Kauderer in the amount of \$100.00; and

4. Requiring Mr. Kauderer to complete the four-hour Instructional Program for Broker Management of Escrow Accounts within six months of the entry of the Commission's final order.

DONE AND ENTERED this 21st day of November, 2003, in
Tallahassee, Leon County, Florida.

Patricia H. Malono

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2003.

ENDNOTES

^{1/} All references to the Florida Statutes herein shall be to the 2000 edition unless otherwise noted.

^{2/} Attached to the Administrative Complaint as Exhibit 1 are two documents, one dated February 7, 2000, and one dated February 28, 2000.

^{3/} Attached to the Administrative Complaint as Exhibit 2 is a Division Office Inspection & Escrow/Trust Account Audit Form dated April 30, 2001, in which it was noted that: "Broker to be re-visited within 30 days to address all issues." Also included as part of Exhibit 2 to the Administrative Complaint is a Debit Memo issued by Ocean Bank to New Riviera Realty and dated April 17, 2001.

^{4/} A reconciliation statement is a written statement prepared by a real estate broker to show the amount of money that has been deposited into the brokerage's escrow account, the amount of money that has been disbursed from the escrow account, and the

balance remaining in the escrow account at a specific point in time.

^{5/} Counts I through IV relate solely to Mr. Kauderer and Counts V through VIII relate solely to New Riviera Realty. The counts involving Mr. Kauderer and New Riviera Realty are, however, identical, and each pair of counts will be treated as one for purposes of discussion.

^{6/} Although the Division offered proof at the final hearing only of purported real estate transactions evidenced by documents dated February 7, 2000, and February 28, 2000, the Administrative Complaint did not include factual allegations relating to these documents. Rather, the only reference in the Administrative Complaint to a real estate transaction was to one that allegedly took place on April 14, 2001; the Division did not, however, offer any proof at the final hearing to support this factual allegation.

It is presumed that the allegation in paragraph 7 of the Administrative Complaint is the result of an oversight by the Division because the documents dated February 7 and 28, 2000, were attached as exhibits to the Administrative Complaint. Because Mr. Kauderer and New Riviera Realty had notice that the February 7 and 28, 2000, documents were at issue, the failure to properly allege the factual basis for Counts I and V in the Administrative Complaint did not prejudice their ability to defend the charges. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act."); Werner v. Department of Insurance, 689 So. 2d 1211, 1213 (Fla. 1st DCA 1997) ("The record affords not the slightest hint that Ms. Werner was in any way embarrassed in the preparation of her defense to the charges.")

^{7/} Mr. Esposito's testimony regarding his interactions with Mr. Kauderer has been carefully considered, and Mr. Esposito's testimony that Mr. Kauderer failed to provide him with all relevant documents relating to the New Riviera Realty escrow account is rejected as unpersuasive and lacking in credibility. Mr. Esposito's testimony regarding the documents he received from Mr. Kauderer is vague and contradictory, and he made statements during his testimony that were inconsistent with the exhibits presented by the Division. Mr. Esposito's testimony

evinces that his memory of the audit of New Riviera Realty's escrow account is imprecise and that he failed to understand the explanations that Mr. Kauderer offered regarding the two contracts for sale and purchase and the fact that New Riviera Realty's escrow account had been used only once. In addition to the lack of credibility of Mr. Esposito's testimony, it is noted that the Division did not introduce into evidence all of the documents sent to Mr. Esposito by facsimile transmittal in August 2001; specifically, the Division introduced only one page of a multi-page facsimile transmittal from Mr. Kauderer to Mr. Esposito on August 13, 2001. This further diminishes the credibility of Mr. Esposito's testimony that Mr. Kauderer did not provide him with any documents between April 30, 2001, and September 11, 2001.

^{8/} Rule 61J2-14.012(3) merely describes the information that must be included in the reconciliation statement when the trust liability and the bank balances do not agree. Mr. Kauderer could only violate this section of Rule 61J2-14.012 if he had prepared reconciliation statements and failed to include the information specified in Rule 61J2-14.012(3) when warranted.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.